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Nos. 93-70 and 93-108

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

OREGON WASTE SYSTEMS, INC. and
GILLIAM COUNTY, OREGON,
Petitioners,
v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON AND ENVIRONMENTAL QUALITY COMMISSION OF THE STATE OF OREGON,
Respondents.

COLUMBIA RESOURCE COMPANY, L.P.,
a Washington limited partnership,
Petitioner,
v.

ENVIRONMENTAL QUALITY COMMISSION,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

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BRIEF FOR PETITIONER COLUMBIA RESOURCE COMPANY, L.P.

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QUESTION PRESENTED

Did the Oregon Supreme Court err when, under the Dormant Commerce Clause, it sustained the State's imposition of a surcharge on out-of-state waste disposed of in Oregon where the surcharge purports to recover costs incurred by the State and where in-state waste is not similarly burdened? *

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* Contained in this brief's caption are the names of all parties to the proceeding in the Oregon Supreme Court.

Petitioner Columbia Resource Company has no parent or subsidiary companies. Supreme Court Rule 29.1.

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OPINIONS BELOW

The Oregon Supreme Court's opinion in *Gilliam County v. Department of Environmental Quality*, 316 Or. 99, 849 P.2d 500 (1993), is reproduced in the

petition for writ of certiorari at Appendix A. Appeal to that court was taken from the decision of the Oregon Court of Appeals, 114 Or. App. 356, 837 P.2d 965 (1992), which is reproduced in the petition at Appendix B.

JURISDICTION

The Oregon Supreme Court entered its judgment on June 9, 1993. On July 14, 1993, petitioner Columbia Resource Company, L.P. filed with this Court a petition for writ of certiorari, which petition was granted on September 28, 1993. This Court has jurisdiction to review by certiorari the decision of the Oregon Supreme Court pursuant to 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The pertinent text of the following statutes and regulations is reproduced in the petition for writ of certiorari at Appendix C: ORS 183.400, ORS 459.015, ORS 459.297(1), ORS 459.298, OAR 340-61-115(1), and OAR 340-61-120(6).

United States Constitution, Article I, section 8, clause 3 provides:

> Congress shall have the power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

STATEMENT OF THE CASE

In response to growing public pressure (R.0079), the Oregon Legislature, in 1989, enacted comprehensive waste reduction legislation. House Bill 3515, Or. Laws 1989, Ch. 833. Anxious that continued disposal in Oregon of instate *and* out-of-state waste

would reduce capacity available to instate waste,[1] ORS 459.293(2),[2] the legislature declared "[t]here is a shortage of appropriate sites for landfills in Oregon" and that "[i]t is in the best interests of the people of Oregon to extend the useful life of solid waste disposal sites by * * * requiring solid waste to undergo volume reduction through recycling and reuse measures before disposal * * *." ORS 459.015 (1)(c), (d). Sections 155 and 156 of House Bill 3515 provide for a surcharge on solid waste generated outside the State of Oregon and disposed of within the State. Sections 155 and 156 were codified as ORS 459.297 and 459.298.

ORS 459.298 directs Oregon's Environmental Quality Commission (EQC) to establish by rule a surcharge on the disposal of foreign waste based upon the costs to the State and its political subdivisions of disposing of solid waste generated outside the State. Aware, however, that a surcharge fixed too high might discourage importation of foreign waste, with a consequent loss of revenue and, conversely, that a fee set too low might likely accelerate lost capacity, EQC labored for an optimal "political valuation." (R. 0661; 0688.)

In December 1990, EQC amended Oregon Administrative Rules 340-61-115 and 340-61-120[3] to reflect a surcharge of $2.25 per ton on foreign waste. Sec-

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[1] In the interest of readability, out-of-state waste will be referred to as "foreign" waste and instate waste referred to as "domestic."

[2] ORS 459.293 was renumbered in 1991 as 459A.105. Or. Laws 1991, Ch. 385, § 91.

[3] OAR 340-61-115 and 340-61-120 are currently renumbered as 340-97-110 and 340-97-120, respectively.

tions 152 and 153 of House Bill 3515, ORS 459A.110 and 459A.120 (formerly ORS 459.294 and 459.295, respectively), direct as well that EQC establish a fee on domestic waste. The fee on domestic waste, however, is not cost driven; it is a revenue device for supporting environmental protection programs, solid waste planning, and recycling. ORS 459A.120. The fee on domestic waste, moreover, is statutorily limited to $.50 per ton regardless of actual costs. ORS 459A.110(5).[4]

Unlike the domestic fee, the surcharge on foreign waste is not statutorily capped but is, instead, comprised of the following identified "costs":

1. **Statewide activities for reducing environmental risk and improving solid waste management—$.58 per ton.** According to Oregon's Department of Environmental Quality (DEQ), $.42 of this category equals the amount of general fund revenues allocated to solid waste programs, including $.10 for domestic waste reduction activity, $.08 for administrative rulemaking, $.08 for statewide policy, $.08 for ad-

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[4] Apparently concerned that invalidation by the courts of the $2.25 per ton surcharge would create a situation in which only domestic waste was subject to an additional levy, the Oregon Legislature in 1991 amended the statute to increase the instate fee to $.85 per ton and to subject foreign waste to the same $.85 per ton charge as domestic waste. *See* ORS 459A.110(6) (as amended by 1991 Or. Laws Ch. 385, § 13). (This fee was added to the $2.25 surcharge, which was left in place by the Legislature.) If the $2.25 per ton surcharge ultimately is upheld by the courts, however, the $.85 per ton fee would again be limited to domestic waste. Or. Laws 1991, Ch. 385, §§ 91 and 92. Thus, the ultimate result would be much the same as under the original 1989 law—the charge on domestic waste would be $.85 per ton, while the surcharge on foreign waste would be $2.25 per ton.

ministering regulatory programs, and $.08 for statewide solid waste management planning. (R. 0866; 0896-0897.) The remaining $.16 is allocable to a portion of the $.50 fee previously assessed on domestic waste, monies similarly dedicated to waste reduction and recycling, ground water monitoring, and planning activities by and grants to local government units for disposal and recycling. ORS 459A.120.

2. **Reimbursements to the state for tax credits and other public subsidies—$.66 per ton.** Although this category remains in force, EQC recently made access to the tax credits substantially more difficult. *See* OAR Ch. 340, Div. 16.

3. **Solid waste reduction activities related to the review and certification of waste reduction and recycling plans—$.05 per ton.** This charge apparently includes the cost of reviewing waste reduction and recycling plans of sending jurisdictions. (R. 0932); *See also*, ORS 459.305. The per ton assessment, however, will continue long after any given plan is approved. (R. 0441.)

4. **Increased environmental liability—$.72 per ton.** Although DEQ estimated the likelihood of petitioner's responsibility for $50 million worth of unfunded environmental liability at one tenth of one percent (R. 0679), EQC calculated this charge assuming a 100% probability of a $90 million cleanup. (R. 0681.)

5. **Lost disposal capacity—$.20 per ton.** This component includes environmental studies and political deliberations associated with siting new landfills. (R. 0884.)

6. **Publicly supported infrastructure—$.03 per ton.** Among the "costs" comprising this category are

highway maintenance, additional rail crossings, and increased traffic patrolling (R. 0687); petitioner, however, transports its waste via barge.

7. **Nuisance impacts from transportation—$.01 per ton.** DEQ conceded the use of traffic accident statistics gleaned from PUC records as a "proxy" for measuring loss of "quiet enjoyment." (R. 0688; 0896.) Petitioner transports by way of barge which has no relation to highway traffic statistics.

Despite the differential fees assessed, there is no distinction in composition or quality between domestic and foreign waste. ORS 459.305 requires that all waste disposed of in Oregon landfills, except for waste generated in the county of disposal, comply with equivalent waste reduction and recycling standards applicable to domestic waste.

With this in mind, petitioner, a company that collects waste generated in Clark County, Washington, and arranges for its transport to and disposal at a landfill in Morrow County, Oregon, instituted a rule challenge in the Oregon Court of Appeals claiming, among other things, a violation of the Commerce Clause of the United States Constitution.[5]

The court of appeals upheld the rules, holding that the surcharge is a compensatory fee given its restriction to disposal costs. As such, the court of appeals believed the surcharge facially reasonable and, because ORS 183.400 limits the court's constitutional scrutiny to the face of the rule,[6] found petitioner

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[5] Oregon's Administrative Procedures Act authorizes judicial review of administrative rules pursuant to ORS 183.400.

[6] In fact, judicial review authorized by ORS 183.400(3) is somewhat broader. Courts may consider:

precluded from proving the surcharge disproportionate to the costs incurred. (Pet. App. 67.)

Petitioner thereafter petitioned the Oregon Supreme Court for review and, after granting the petition, that court likewise upheld the rules, finding their nexus to the State's costs a discernible basis, apart from origin, for treating foreign waste differently, despite the absence of any corresponding surcharge on domestic waste. (Pet. App. 26.)

SUMMARY OF ARGUMENT

The $2.25 per ton surcharge assessed by the State of Oregon on foreign waste purports to recover costs incurred by the State in the administration of its solid waste program. Under the statutory scheme, the State would collect only $.50 per ton on domestic waste. The Oregon Supreme Court rejected petitioner's constitutional challenge to the surcharge, accepting the State's claim that the nexus between the surcharge and costs incurred was constitutionally sufficient. Unfortunately, the court's analysis was incomplete because it failed to inquire whether inter-

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(a) The rule under review;

(b) The statutory provisions authorizing the rule; and

(c) *Copies of all documents necessary to demonstrate compliance with applicable rulemaking procedures.*

(Emphasis supplied). Accordingly, ORS 183.400(4) empowers courts to invalidate rules if they:

(a) *Violate*[] *constitutional provisions;*

(b) Exceed[] the statutory authority of the agency; or

(c) [Were] adopted without compliance with application rulemaking procedures.

(Emphasis supplied).

state commerce is similarly burdened. Because the Oregon court's reasoning makes no reference to a corresponding burden on domestic waste, the court either dispensed entirely with the discrimination standard or misapplied it. The Commerce clause demands equal treatment of interstate and intrastate commerce.

Oregon's surcharge on foreign waste discriminates against foreign consumers of Oregon landfill capacity; the burden, therefore, shifts to the State to justify the surcharge by demonstrating the consequent local benefits and the unavailability of nondiscriminatory alternatives adequately serving the State's interests. The Oregon Supreme Court failed to apply this test. In any event, a finding of discrimination is dispositive because a uniform charge on waste generated both within and without Oregon is an obvious and readily available nondiscriminatory alternative.

That Oregon's surcharge on foreign waste discriminates against foreign generators of waste is apparent. First, the surcharge discriminates on its face. The differential fee structure exacts from foreign consumers of landfill capacity $2.25 for each ton disposed; Oregonians, on the other hand, must pay just $.50 per ton.

Second, the surcharge discriminates in its purpose. The surcharge on foreign waste is the product of Oregon's finding that disposal within the State of domestic *and foreign* waste will ultimately reduce the capacity available to domestic consumers. By recovering costs only from foreign consumers, the State seeks to secure for Oregonians a priority over its landfill capacity.

Third, the surcharge discriminates in its effect. Because many of the surcharge's components are abstractions and contingencies, they are not costs at all. Assuming they are valid costs, however, the State cannot justify its failure to collect them from Oregonians as well. And, even assuming the State is collecting its costs indirectly from Oregonians, its assessment of a consumption tax exclusively on foreign consumers discourages use of the State's landfills in a manner from which domestic consumers are exempt.

These discriminatory characteristics, taken alone or considered together, present the State with a burden of justification it cannot carry. To the extent the Oregon Supreme Court found otherwise, it should be reversed.

ARGUMENT

I. THE OREGON SUPREME COURT ERRED WHEN IT FAILED TO STRIKE THE PURPORTEDLY COST DRIVEN SURCHARGE ON FOREIGN WASTE BECAUSE DOMESTIC WASTE SUFFERS NO CORRESPONDING BURDEN.

Inconsistent with this Court's fundamental decree that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State," *Armco, Inc. v. Hardesty*, 467 U.S. 638, 642 (1984), the Oregon Supreme Court sanctioned the State's assessment of a $2.25 per ton surcharge on foreign waste despite a corresponding charge on domestic waste statutorily limited to $.50 per ton. As a prelude to exploring the innumerable constitutional infirmities of Oregon's misdirected "cost" recovery scheme, it remains first to discuss why the Oregon court's decision is the product of inadequate constitutional reasoning.

Solid waste is an article of commerce; Oregon is therefore subject to scrutiny under the Commerce Clause when it restricts waste's movement. *Philadelphia v. New Jersey*, 437 U.S. 617, 622-623 (1978). The Oregon Supreme Court accepted as much. (Pet. App. 23.) It also accepted the State's view that because the surcharge on foreign waste is ostensibly designed to recover regulatory costs, it is a compensatory fee. (Pet. App. 27.) Given this combined acceptance, then, a precise constitutional standard prevails: A compensatory fee is constitutionally impermissible if (1) it is not based upon a fair approximation of use; or (2) it *discriminates against interstate commerce*; or (3) it is excessive compared with the governmental benefit conferred. *Evansville-Vanderburgh A.A. Dist. v. Delta Airlines, Inc.*, 405 U.S. 713, 716-717 (1972).

If the surcharge is discriminatory, "it is typically struck down without further inquiry." *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. ——, 112 S.Ct. 2009, 2014 (1992). Should a court choose to inquire further, the burden shifts to the State "to justify [the discrimination] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt v. Washington Apple Advertising Comm'n.*, 432 U.S. 333, 353 (1977). Combined with this justification, Oregon must demonstrate that its discriminatory treatment "is demonstrably justified by a valid factor unrelated to economic protectionism." *Wyoming v. Oklahoma*, 502 U.S. ——, 112 S.Ct. 789, 801 (1992).

Despite the clarity of these principles, it is difficult to follow their application by the Oregon court. The

court began by cautioning that an origin provoked surcharge on foreign waste would necessarily fail under the Commerce Clause. (Pet. App. 23-24) (Citing *Chemical Waste*, 112 S.Ct. at 2013-15). Oddly, then, the court referred to the fee as "a differential charge," one statutorily actuated by the Oregon state line. (Pet. App. 24.) From this reference, and from the court's finding that the State met its burden of justifying the surcharge (Pet. App. 26), the court must have found the surcharge discriminatory. *See Wyoming*, 112 S.Ct. at 801.

The court, though, equivocated. Because the surcharge is driven by costs, found the court, it does not discriminate on its face; however, the opinion follows with, "[t]hrough the statutory and regulatory criteria, the State has met its burden of showing that the surcharge 'is jusified by a valid factor unrelated to economic protectionism'" (Pet. App. 26)—language relevant only where discrimination exists. *Chemical Waste*, 112 S.Ct. at 2015. If the court considered the surcharge nondiscriminatory, the State need not justify the statutory scheme. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). If, instead, the court considered the surcharge discriminatory, its analysis is constitutionally incomplete. The State must not only distance its discriminatory fee from economic protectionism, it must as well "justify [the discrimination] in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt*, 432 U.S. at 353. The Oregon court declined to apply these principles.

The court's disinclination to squarely confront the discrimination question reappears in its discussion of compensatory fees. When citing the pertinent test

announced in *Evansville-Vanderburgh*, the court in parenthesis wrote, "fees reflecting a fair approximation of the use of facilities and not excessive in relation to costs incurred do not violate the Commerce Clause * * *." (Pet. App. 28.) Conspicuously absent from the parenthetical is the additional requirement that compensatory fees not discriminate against interstate commerce. *Evansville-Vanderburgh*, 405 U.S. at 716-717. This emasculated version of the test improperly insulated the State from its burden of justifying the discriminatory surcharge; a burden it cannot carry.

Chemical Waste provides the analytical model the Oregon court should have followed. Like Oregon's $2.25 surcharge assessed exclusively on foreign solid waste, Alabama assessed a $72 per ton fee exclusively on foreign hazardous waste. Also like Oregon, among the justifications advanced in defense of the Alabama fee was recovery of compensatory revenue for the costs and burdens imposed by foreign waste generators. 112 S.Ct. at 2014. Granting that such an interest might be legitimate, this Court regarded the explicit distinction between foreigners and Alabamans as facially discriminatory, activating the State's three-pronged burden of justification: (1) local benefits, (2) absence of nondiscriminatory alternatives, and (3) presence of a factor unrelated to economic protectionism. *Id.* at 2014-2015. In view of a generally applicable per ton fee on *all* hazardous waste as an obvious nondiscriminatory alternative for furthering Alabama's interests, the State succumbed to its burden.

Had the Oregon Supreme Court engaged this analytical framework, the surcharge on foreign waste would have been similarly "stricken."

II. THE OREGON COURT'S MISAPPLICATION OF THE LEGAL STANDARD IS COMPOUNDED BY ITS FAILURE TO RECOGNIZE THE DEPTH AND DIVERSITY OF DISCRIMINATION INHERENT IN THE STATE'S SURCHARGE ON FOREIGN WASTE.

Insofar as the Oregon court viewed the surcharge as both nondiscriminatory *and* properly justified, the court's position on discrimination is not clear. What is clear is the court's failure to recognize the several ways in which the surcharge transgresses the Commerce Clause's antidiscrimination principle. "The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause." *Boston Stock Exchange v. State Tax Comm'n.*, 429 U.S. 318, 329 (1977). "The very purpose of the Commerce Clause," wrote this Court in *McLeod v. J. B. Dilworth Co.*, 322 U.S. 327, 330 (1944), "was to create an area of free trade among the several states." The operative principle, of course, is that "the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). The principle serves as a counterweight against the parochial inclinations of state legislatures and averts "a multiplication of preferential trade areas." *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951). Discriminatory laws, therefore, are presumptively forbidden. *Chemical Waste*, 112 S.Ct. at 2014.

In this case, the question of discrimination is dispositive because the limited form of judicial review authorized by Oregon's Administrative Procedures Act disables, in large part, the State from factually justifying its discriminatory treatment of foreign

waste. *See* ORS 183.400. Moreover, assuming the State could justify its discriminatory treatment of foreign waste, a uniform charge on waste generated both within and without Oregon is clearly an adequate nondiscriminatory alternative. *See Chemical Waste*, 112 S.Ct. at 2015. Rather than select the obvious nondiscriminatory alternative, Oregon imposed a differential fee on foreign waste; a fee that discriminates against interstate commerce on its face, in its purpose, and in its effect.

A. The Surcharge on Foreign Waste Discriminates on Its Face Because Its Terms Require Disparate Treatment of Interstate and Intrastate Waste.

This Court's precedents uniformly hold that legislation requiring different treatment of interstate and intrastate commerce constitutes facial discrimination. *E.g., Armco, Inc.*, 467 U.S. at 642. A facially discriminatory surcharge is subject to this Court's strictest scrutiny and may, itself, be a fatal defect. *Hughes v. Oklahoma*, 441 U.S. 335, 441 (1979). Indeed, facially discriminatory laws are virtually per se invalid. *Philadelphia*, 437 U.S. at 624.[7]

Like the additional $72 per ton fee considered facially discriminatory in *Chemical Waste*, the Ore-

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[7] There prevails a strict constitutional presumption against explicit embargoes, irrespective of purpose. *Regan, the Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1134 (1986). From a constitutional perspective, any economic disadvantage is the same as an outright ban or embargo. *New Energy Co. v. Limbach*, 486 U.S. 269, 309 (1988). Professor Regan suggests that States be called upon to produce clear and convincing evidence of innocent purpose to justify explicit treatment of interstate commerce; as an aside, he adds, "explicit laws will rarely be upheld." *Regan*, supra at 1135.

gon surcharge recovers $2.25 for each ton of foreign waste, $1.75 more than it recovers for domestic waste. It is precisely that explicitness which renders the surcharge constitutionally suspect. The administrative rules perpetuate the problem. The administrative scheme, OAR 340-97-110 and 120, requires foreign generators of waste to fund contingent environmental liability through a form of risk premium as a component of the surcharge; Oregonians, however, are not reciprocally burdened. *Compare* (R. 0676-0681) *with* ORS 459A.120. The same rings true for infrastructure and nuisance impacts—the surcharge exacts from foreign generators a fee for these "costs" from which Oregonians are exempt. *Compare* (R. 0687-0689) *with* ORS 459A.120.

Because the surcharge explicitly distinguishes between foreign and domestic generators of waste, it is facially discriminatory. As such, if not unconstitutional per se, the State must engage its burden of justification—a burden it cannot carry.

B. The Surcharge on Foreign Waste Discriminates Because in Purpose and Effect It Is the Product of Economic Protectionism.

Through its surcharge on foreign waste, Oregon manifests, on behalf of its citizens, a misconceived priority over the State's landfill capacity; a misconception that renders the surcharge virtually per se invalid as economic protectionism. *Philadelphia*, 437 U.S. at 624. The Oregon Supreme Court acknowledged the rule. (Pet. App. 22-23.) What the court unfortunately did not acknowledge, however, is that economic protectionism inheres in legislation either calculated to or *having the effect of* saddling those

outside Oregon with a disproportionate burden of conserving Oregon's landfill capacity. *Chemical Waste*, 112 S.Ct. at 2015, n.6. The Oregon court misapplied the protectionism principle when it concluded that the State's effort to recover environmental regulatory "costs" is sufficient, standing alone, to withhold the label "economic protectionism." (Pet. App. 26.) Indeed, in *Chemical Waste*, the Alabama Supreme Court was similarly mistaken, prompting the following from Justice White:

> The Alabama Supreme Court found no "economic protectionism" here * * * based on its conclusions that the legislature was motivated by public health and environmental concerns. This narrow focus on the intended consequence of the additional fee does not conform to our precedents, for "[a] finding that state legislation constitutes 'economic protectionism' may be made on the basis of either *discriminatory purpose * * * or discriminatory effect * * *.*" The "virtual per se rule of invalidity" applies "not only to laws motivated solely by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade."

112 S.Ct. at 2015, n.6 (emphasis supplied) (citations omitted).

Oregon's surcharge on foreign waste qualifies in both respects: Its purpose is the preservation of landfill capacity for Oregonians and, purpose aside, it will plainly have that effect.

1. *The Surcharge Is a Product of Protectionist Purpose.*

Oregon's 1989 Legislature proclaimed, "[t]he disposal in Oregon of * * * solid waste generated both *outside* and within Oregon will reduce the total capacity available for disposal of * * * solid waste generated in this state * * *." ORS 459A.105(2) (formerly ORS 459.293(2)) (emphasis supplied). A sponsor of the surcharge in the Oregon Legislature, State Senator Dick Springer commented, "we feel that Washington State ought to develop their [sic] own instate landfill capacity for municipal solid waste." (R. 0016.) The State's purpose is clear. Oregon, however, may not "attempt to isolate itself from a problem common to the several States by raising barriers to the free flow of interstate trade." *Chemical Waste*, 112 S.Ct. at 2012.

Legislation, including subsequent environmental regulation, is the product of protectionist purpose if it is calculated to improve the competitive position of local economic actors vis' a vis' their foreign competitors.[8] *Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1097 (1986). This definition of protectionism contemplates more than a

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[8] It is of no consequence that the surcharge burdens access by foreign consumers to local natural resources instead of the more paradigmatic burden on access by foreign producers to local markets. Consumer and resource protectionism qualify as economic protectionism. *Regan, supra* at 1271. According to Professor Regan, explicitness is all but conclusive evidence of protectionist purpose. *Id.* at 1145. The mere fact of a $2.25 surcharge assessed exclusively on foreign waste, therefore, is strong evidence of Oregon's purpose. Moreover, significant protectionist effect also serves as persuasive evidence of protectionist purpose. *Id.* at 1136. *See* discussion, post at p. 22.

State's intent to confer an absolute advantage upon its citizens; it includes as well a State's effort to alleviate an alleged local disadvantage. *Id.*

Even the State's most plausible argument in defense of the surcharge, therefore, is a product of protectionist reasoning. As statutorily tied to "costs," one ostensible purpose of the surcharge is to relieve what is presumed to be the subsidized use by foreign consumers of Oregon landfills and other associated facilities. (R. 0881.) That purpose, however, even if genuine, is calculated to alleviate a local disadvantage and is therefore protectionist in purpose. *See Regan*, *supra* at 1097.

No fine distinctions, though, are necessary to appreciate the protectionism inherent in the State's other articulated purposes. In response to growing public concern[3] (R. 0079), the State enacted a surcharge on foreign waste to preclude reference to Oregon landfills as a low cost option. (R. 0018.) Undermining the Oregon court's cost rationale and offering insight into the administrative process is the following from DEQ's Fiscal and Economic Impact Statement:

> [I]f the surcharge is set "too low," it could encourage disposal of larger amounts of out-of-state solid waste in Oregon, and diminish the effective life of Oregon landfills. * * * If the surcharge is "too high," it could discourage the disposal of out-of-state solid waste. This might in turn indirectly discourage the establishment of new regional landfills * * * in Oregon * * *.

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[3] Resident opposition to foreign medical waste has confined the recently constructed medical waste incinerator in Worden, Oregon, to domestic waste processing. (R. 0080.)

> Instate levels of solid waste generation might not be sufficient to warrant the development of new landfills; or instate solid waste disposal rates might have to be raised more to cover the cost of new landfills when they eventually become necessary, without the contribution of out-of-state disposal fees to construction and operation costs.

(R.0213-0214.) This language smacks less of identifying costs and more of striking a political balance between landfill consumption and acquisition of foreign revenue.

The record, in fact, strongly suggests that the State did not identify costs, rather, it chose them; [10] a choice driven, at least in part, by the stigma of receiving foreign waste. The following colloquy from an EQC work session leading up to the rules' adoption illustrates the point:

> Representative Cease: [Foreign waste] becomes also an important fact for the people of the State in economic terms. On the other hand, it is also true that if you were to tell the residents of my area of Portland, or other

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[10] In fact, the entire administrative process smelled of volume control:

> Annual volume of waste disposed of is estimated to be about 600,000 tons eventually (*total for all Oregon landfills expected to accept out-of-state waste*). A six percent decrease in volume would be 36,000 tons, resulting in an annual revenue loss of 900,000 (at $25/ton) to the landfill operator. A $3.50 surcharge would cause a 14 percent increase in disposal charges, and, at an elasticity of one, would result in an annual revenue loss of $2.1 million to the site operator.

(DEQ's Fiscal & Economic Impact Statement, R. 0214.)

people in the State tomorrow that we weren't going to have any more solid waste coming into the State, they would say why the hell were we having it come in in the first place? They're not going to buy any economic argument, they're not going to buy any argument that that justifies that. If you left it up to a lot of residents out in the community, if I showed it to my constituents, they would say we don't need it, we would like to prevent it. * * * I am a strong regionalist in this regard. I think you have to look at it in that sense. Now that's not to say I want to end up bringing waste from California. I do not. * * * I would also say to you that I don't want all the waste in the region coming to Oregon. * * *.

EQC Chair: Appreciate your interest and thoughts. Any questions?

Commissioner Lorenzen: Well, I have a question, one thing that strikes me is the first introduction to this process or this particular problem, there seem to be two themes going through this, one is that we don't want out-of-state waste in Oregon, second theme is given that it is a desirable thing or a neutral thing to bring waste in, we have certain costs imposed on the state as a result of bringing fees in. I guess nothing is ever pure, but what is, what really is driving this? Is it a cost issue, or is it a more or less social desirability issue * * *?

Representative Cease: Well, I, from my vantage point, I think there has to be some sort of balance. I think the economic factor is a factor. It is not the sole factor. There are political factors, there are public perception factors, all of those are part of it.

(R. 0023-0027.) Following EQC's adoption of a preliminary surcharge set at $2.70, the surcharge was referred to the Emergency Board, an interim legislative committee, for approval. During its work session, an exclamation point was placed after this idea of politically motivated "cost" selection by an Emergency Board member who, although an opponent of the importation of foreign waste, could not endorse DEQ's methodology:

> I doubt there is anyone here on the E-Board that says we ought to establish a charge low enough so that refuse can come in from out of state and be running on our highways and filling up Oregon's acres of land, but I also think that we did accept a figure too high, and that it'll probably tend to discourage the transportation in, which may be a great thing to do, but the charges in some categories, I believe, are artificial and really still not from a practical standpoint, or a budgetary standpoint can be supported.

(R. 0118-0119.)[11]

Oregon's surcharge on foreign waste is the product of an unabashed effort by the State to improve the competitive position of its citizens vis-à-vis their foreign competitors over access to the State's landfill capacity. An avowed effort of this kind is discriminatory and is either constitutionally invalid per

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[11] Petitioners, incidently, are not alone in their frustration. Mike Conway, a private citizen, testified before EQC: "I still live in Portland, fourth generation, work in Washington, I still pay Oregon tax. I have Washington people working in Oregon who still pay Oregon tax. Where do we stop the wars? That's all." (R. 0279-0280.)

se or activates the State's burden of justification; a burden it cannot carry.

2. *The Surcharge Breeds Protectionist Effect.*[12]

The Oregon Supreme Court failed to recognize that discrimination may manifest itself in the means as well as the ends of legislation. *Philadelphia*, 437 U.S. at 626. No court is bound by the name given a law; it will, rather, determine for itself the enactment's practical impact. *Hughes*, 441 U.S. at 335. Method, therefore, matters. *Westinghouse Corp. v. Tully*, 466 U.S. 388, 398 (1984). Specifically, "[d]o the methods by which the * * * taxes are assessed discriminate against some participants in interstate commerce in a way that contradicts the central purpose of the Commerce Clause?" *American Trucking Assn. v. Scheiner*, 483 U.S. 266, 282 (1987). Yet more to the point, "[t]he way in which a tax levied on participants in interstate commerce is measured and assessed bears directly on whether it implicates central Commerce Clause values." *Id.*[13] The manner

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[12] The effects deducible from the face of the surcharge to which petitioner refers should be distinguished from those effects following from the surcharge in its operation. This Court routinely hypothesises discriminatory effect. *E.g. Armco*, 457 U.S. at 644 (challenger need not prove actual discriminatory impact); *Westinghouse Corp. v. Tully*, 466 U.S. 388, 406-407 (1984) ("when a tax, on its face, is designed to have discriminatory economic effects, the court 'need not know how unequal a tax is before concluding that it unconstitutionally discriminates'") (Quoting *Maryland v. Louisiana*, 451 U.S. 725, 760 (1981).

[13] Professor Regan similarly defines protectionist effect: Any improvement in the competitive position of local economic actors vis' a vis' their foreign competitors. *Regan*, *supra* at 1095.

in which the surcharge on foreign waste is levied plainly implicates the central Commerce Clause value of anti-discrimination because many of the surcharge components are simply not costs at all; assuming they are costs, Oregonians are not likewise paying them; and even assuming Oregonians are likewise paying them through other means, foreigners are still the losers.

a. *Many Components of the Surcharge Are Simply Not Costs at All.*

User fees calculated to recover costs are lawful so long as they are fixed by a uniform, fair, and practical standard. *Evansville-Vanderburgh*, 405 U.S. at 713. Similarly, the means calculated to achieve cost recovery must be narrowly tailored to achieve that end. *See Sporhase v. Nebraska*, 458 U.S. 941, 958 (1981). Moreover, despite the State's efforts to conceive a wide array of "costs" and rationalize them with figures and computations, discriminatory treatment is forbidden "whether forthright or ingenious." *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940).

The seminal cases in the user fee context illustrate the liberties taken by Oregon with the term "costs." In *Clark v. Paul Gray*, 306 U.S. 583 (1939), this Court upheld a caravaning statute designed to recover specific identifiable costs associated with *highway maintenance and police staffing*. In *Evansville-Vanderburgh*, 405 U.S. 707 (1972), Justice Brennan viewed favorably Indiana and New Hampshire statutes contemplating recovery from enplaning passengers costs of *airport construction and maintenance*. The surcharge at issue here, on the contrary, is com-

prised of "costs" far less tangible.[14] Many of the "cost" components are either imprecisely tailored, and therefore over inclusive, or represent worst case contingencies.[15] A few examples will demonstrate.

Among those "costs" sweeping too broadly is category number 1 (statewide activities for waste reduction and management), $.10 of which is dedicated specifically to waste reduction in Oregon. (R. 0896.) Foreign consumers of landfill capacity manifestly do not contribute to the amount of waste generated in Oregon. Regulatory costs for reducing waste production by Oregonians are simply not attributable to foreign consumers.

Also, the State seeks to exact $0.1 per ton for its residents' loss of "quiet enjoyment" along transit routes. (R. 0026.) Although a conceptual detriment to a small class of residents, there is no cost to the State—certainly none of this money nor any corresponding portion of general fund revenue from domestic generators is paid to property owners for their

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[14] To adequately appreciate the distinction between highway maintenance and airport construction and maintenance at issue in *Clark* and *Evansville*, respectively, it is critical to note that the costs Oregon seeks to recover are, in large measure, "costs" of its own creation. $.63 of the $2.25 surcharge finances waste reduction and recycling programs implemented by the State. $.66 compensates the State for perceived lost benefits from tax credits extended to landfill operators accepting foreign waste. $.72 represents a form of risk premium based upon environmental contingencies which may never occur.

[15] DEQ conceded that the surcharge on foreign waste is not based on actual accounting costs and is not limited to "direct costs" to Oregon, but rather anticipates other related costs. (R. 0052.)

loss of "quiet enjoyment." DEQ's own reasoning is instructive:

> The loss of this "quiet enjoyment" is difficult to quantify * * *. However, some minor loss of "quiet enjoyment" can be expected. The draft EPA report has stated that this loss can be quantified through "political valuation", [sic] underscoring the difficulty of quantifying these impacts.

(R. 0026.) To strike this "political valuation" DEQ conceded the use of traffic accident statistics as a proxy for measuring nuisance. (R. 0896.) Petitioner, however, transports waste into Oregon by barge. Thus, there is entirely no nexus between this "cost" and petitioner's activity.

The infrastructure "cost" of $.03 per ton, moreover, for roadway maintenance, extra rail crossings, and additional traffic patrolling is similarly flawed. Because petitioner transports by barge, it does not significantly contribute to these costs.

Alternately, in regard to contingencies, although DEQ calculated the amount necessary to offset the risk of unfunded environmental liability occasioned by landfills processing foreign waste at $.03 per ton, the State forecasted a $90 million cleanup as though certain to occur, resulting in the $.72 per ton figure selected. (R. 0676-0681.) First, a contingency is not a cost. EQC Chairman Hutchison expressed it best: "It seems like our costs are more actual in these other situations and that it is more of a—we have this contingency issue that we are trying to treat as a cost issue." (R. 0781.) Second, a contingency, by definition, is not a certainty; it is, rather, a possibility. Charging foreign generators in this way is

neither cost recovery nor actuarially sound; it is a worst case scenario impermissibly attributed to interstate commerce.

The impetus for the surcharge on foreign waste emphatically is not cost recovery. On the contrary, it is a volume control device designed to balance lost disposal capacity against foreign revenue receipts. (R. 0213.) To that end, the State selected an optimal figure and rationalized "cost" categories to fit accordingly.[16] (R. 0213.)

b. *If, in Fact, Components of the Surcharge Are Costs Incurred, Why Aren't Oregonians Paying Them as Well?*

This Court has routinely invalidated legislation denying to foreign taxpayers the favorable treatment accorded their domestic counterparts. *See, e.g. New Energy Co. v. Limbach*, 486 U.S. 269 (1988) (tax credit granted exclusively to Ohio Ethynol Producers).[17] More specifically, the State may not exact more than a just share from foreign consumers of Oregon landfill capacity; inversely, it may not exact

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[16] At the November 16, 1990, Emergency Board meeting convened to review the proposed surcharge, "Speaker Katz commented that her use of the word 'arbitrary' referred to the difficulty of demonstrating, over time, the relationship between surcharge components and true costs." (Committee Minutes, R. 0954.)

[17] *See also, Tyler Pipe Inds. v. Dept. of Revenue*, 483 U.S. 232 (1987) (Washington multiple activities exemption enjoyed by domestic manufacturers/wholesalers denied to foreign manufacturers wholesaling domestically and domestic manufacturers wholesaling elsewhere); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (exemptions and tax credits for "first use" tax on natural gas conferred on Louisiana consumers withheld from interstate consumers).

less than a just share from Oregonians. *See Washington Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 748 (1978). In short, equal treatment of foreign and domestic waste generators is a condition precedent to the surcharge's validity. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 70 (1963).

In *Westinghouse*, this Court considered whether a New York tax credit lowering the effective tax rate on gross receipts from a domestic international sales corporation's New York based operations violated the Commerce Clause. In response to the State's claim that taxes collected from interstate commerce were properly apportioned, Justice Blackmun wrote:

> The acceptability of the allocation formula employed by the state of New York is not relevant to the question before us. The fact that New York is attempting to tax only a fairly apportioned percentage of the DISC's accumulated income does not insulate from constitutional challenge the State's method of allowing the DISC export credit. * * * "fairly apportioned" and "nondiscriminatory" are not synonymous terms.

466 U.S. at 399.

Analogously, here, "compensatory" and "nondiscriminatory" are not synonymous terms. The question whether the surcharge on foreign waste compensates the State of Oregon for its costs was not the one begging to be answered by the Oregon Supreme Court; rather, the court should have answered the question whether the State's method of recovering disposal "costs" only from foreign generators of waste impermissibly discriminates against interstate commerce. Although the "costs" identified by the State

are the same regardless of origin[18] (R. 0520), there is a $1.75 gap between the $2.25 surcharge and the $.50 fee assessed on each ton of foreign and domestic waste, respectively. This gap was the subject of criticism from the State's own economist:

> Finally, some of the DEQ identified costs are imposed by waste generators from *all* sources for which the state currently receives no compensation. These categories include: the unfunded liability, the lost disposal capacity, and the other costs category. An efficient resource allocation requires that all consumers pay the full price. Modifying the law to correct the charges to all users would enable the state to set fully efficient disposal fees.

(NERA Evaluation of Out-of-State Waste Surcharge Proposal, prepared by Mark Berkman, R. 0745.) Unmistakably, compared with its treatment of foreign generators, the State has not pursued domestic generators for "costs" with a similar zeal. Why?

Through the $.50 fee assessed on domestic waste, Oregonians neither recompense a nuisance impact for loss of "quiet enjoyment," fund maintenance of infra-

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[18] Mark Berkman, an economist *employed by the state* to review its methodology, commented:

> The DEQ's proposal correctly identifies six cost categories which can be attributed to out-of-state waste which would justify a fee on such waste. Several of these cost categories represent costs imposed on the state *from all waste sources which would justify a fee on all waste disposed in the state regardless of origin.*

(R. 0726) (Emphasis supplied). Berkman further remarked, "[m]any of these costs are not currently charged to instate or out-of-state waste generators." (R. 0744). Following adoption of the surcharge on foreign waste, many of the costs are charged only to foreign waste generators.

structure, pay for lost disposal capacity, nor defray potential environmental liability. *See* ORS 459A.120 (formerly 459.295). Indeed, to the extent any of the surcharge's components are valid costs, the State's method of selective accountability will not do.[19] DEQ justified the advance charge to foreign generators for unfunded environmental liability by noting their capacity to escape the State's taxing clutch should an environmental catastrophe occur. This capacity, however, is not unique to foreign generators. Domestic generators can likewise contribute to that same environmental catastrophe and leave Oregon before the State extracts payment. (R. 0066.) If the State is genuinely concerned about capture, it should collect in advance from Oregonians as well.

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[19] Again, the State's own economic consultant reprehended the State for its failure to collect from foreign and domestic consumers of landfill capacity alike:

Cost Category	Comment
1. Statewide Activities For Reducing Environmental Risk Paid Through Fee	* * *
2. Statewide Activities for Reducing Environmental Risk Paid Through General Fund	* * *
3. Tax Credits and Other Public Subsidies	A cost is incurred only if the costs of the credit exceed the benefits. This cost would be incurred by all waste disposers.
4. Solid Waste Reduction Activities	* * *
5. Unfunded Liability	This cost is also incurred by some in-state waste disposers.

[Continued]

A user fee which seeks full compensation only from foreign consumers of landfill capacity impermissibly shifts the burden of financing the State's solid waste program to interstate commerce. The surcharge on foreign waste, therefore, is the same form of parochial economic protectionism repeatedly stricken by this Court. *See Philadelphia*, 437 U.S. at 626-627.

c. *Even Assuming the State Collects Its "Costs" From Oregonians by Other Means, Its Election of a Consumption Tax on Foreigners Remains Discriminatory.*

A state's method of taxation discriminates where it exerts an "inexorable" pressure on interstate commerce to stay home. *American Trucking*, 483 U.S. at 286-287. The Commerce Clause, accordingly, enjoins any state from manipulating the flow of commerce through taxes. *Nippert v. City of Richmond*, 327 U.S. 416, 425-426 (1946). Conversely, should the commercial flow remain constant despite a discriminatory tax, the Commerce Clause forbids any state from unfairly apportioning income from another. *Armco*, 467 U.S. at 644. Through its chosen fee structure, Oregon secures for itself either preservation of landfill capacity at the expense of foreign consumers or, because it subjects foreign consumers to multiple tax liability, foreign revenue to which it is not entitled, both of which are prohibited.

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[19] [Continued]

6. Lost Disposal Capacity	This cost is also incurred by in-state waste disposers.
7. Other Costs (image, infrastructure, nuisance)	This cost is also incurred by in-state waste disposers.

(R. 0581.)

First, and most patently, Oregon's surcharge on foreign waste will discourage use of the State's landfills by nonresidents. A nonresident's tax is measured exclusively by her consumption of Oregon landfill capacity; an Oregonian's tax, on the other hand, is only nominally linked to consumption. While a nonresident consumer will incur $2.25 of tax liability with each additional ton of space consumed, an Oregonian incurs just $.50—a significantly disparate disincentive to the consumption of landfill capacity. Naturally, the degree to which waste flow is discouraged corresponds directly with its disposal cost; under the differential fee structure, therefore, a nonresident is far more likely to mitigate her waste reduction and consequent consumption of the State's disposal space. Oregon's scheme is an "obvious effort to saddle those outside the State" with the burden of slowing the flow of waste into regional landfills sited in Oregon. *Philadelphia*, 437 U.S. at 629.

The State's method of financing unfunded environmental liability exemplifies the problem. Foreign consumers of Oregon landfill capacity must finance a contingent $90 million cleanup as a precondition to access. Oregonians, though, are assessed no corresponding cost, let alone a similarly transaction sensitive one. The result, of course, is that foreign consumers are more likely than their domestic competitors to search out alternative disposal sites.

Moreover, because the lion's share of foreign waste transported to Oregon is disposed in landfills boasting state of the art environmental protection equipment, foreign consumers are compelled to fund a contingent catastrophic cleanup with no relationship to the risk they create. DEQ determined that an acci-

dent, should one occur, has a 97 percent chance of coming to pass at one of Oregon's 135 unimproved landfills. (R. 0081.) The likelihood of an accident at petitioner's contracted facility, DEQ conceded, is minimal. (R. 0678-0680.) Even assuming Oregonians were called upon to similarly finance unfunded liability, foreign consumers are called upon to subsidize risks for which Oregonians, not they, are responsible. The State heaps a disproportionate burden onto the shoulders of interstate commerce. *See Philadelphia*, 437 U.S. at 629.

If foreign consumers are not dissuaded and choose to use Oregon landfills, the State's scheme of financing its solid waste program will expose them, unlike their domestic competitors, to multiple tax liability. *Armco*, 467 U.S. at 644.[20] For example, a portion of the $.20 per ton allocated to lost disposal capacity contemplates the State's "costs" of siting new facilities. That cost, however, is already assessed on landfill operators through permit fees. (R. 0432.) The same holds true for publicly supported infrastructure—costs associated with highway use are already recovered through PUC weight mile taxes; maintenance of county roads not subject to the weight

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[20] Any argument by the State that the surcharge assessed on foreign waste is intended to offset a burden currently born by Oregonians through general income taxes should be extinguished in advance. Such an argument does not consider foreign consumers of Oregon landfill capacity who earn their income in Oregon. These persons will finance the State's solid waste program twice. For example, a citizen of Washington residing in Clark County who works across the border in Portland, Oregon, will pay more than his "fair share" of the State's solid waste program through Oregon state income taxes deducted by his employer and through the $2.25 surcharge on foreign waste.

mile tax is financed through community host fees. (R. 0537; 0441.)

Most blatant of all, though, is the State's attempt to recover $.10 per ton from foreign generators for waste reduction activities *in Oregon*. (R. 0896.) A foreign generator is statutorily compelled to finance waste reduction twice—once to reduce waste in his own sending jurisdiction (mandated by ORS 459.305 as a condition to access) and a second time, through the fee, to help Oregonians reduce their waste as well.[21] The problem was not lost on State Senator Mike Thorne who, as chairman of the joint subcommittee charged with approving EQC's proposed surcharge, remarked:

> I was attempting to focus on the notion that if in fact a producer of waste is already paying for programs which in part we're paying through the general fund, that there ought to be some mechanism to give them credit for that rather than double taxing them * * *. So it was my hope in asking the questions I did, that somehow or another we could distinguish between the $.42 and the $.17 that add up to the $.59 to basically give the producer out-of-state waste credit for those activities which they've been involved in which are directly the same as

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[21] DEQ admitted that, to the extent Washington has similar waste reduction programs, Washingtonians will pay the same charge twice. (R. 0898.) DEQ, however, maintained that foreign consumers should pay the same as Oregonians, irrespective of costs. (R. 0650.) DEQ's position does considerable violence to its statutory mandate and to the concept of regional solid waste management. Its view invites the very multiplication of preferential trade barriers the Commerce Clause was conceived to forestall. See *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951).

> ours that are covered by $.42 that we're paying in the State.

(R. 0923.) Openly, Oregon seeks to unfairly apportion income from interstate commerce to finance its domestic programs. *See Armco*, 467 U.S. at 644.[22]

These are a sampling of the discriminatory effects both patent and latent in the state's surcharge on foreign waste. In its presentation to EQC, DEQ incorrectly stated that the effect of the surcharge is irrelevant. (R. 0047.) The surcharge's effect, on the contrary, is pivotal. The surcharge impermissibly collects as "costs" abstractions and contingencies; "costs" the State seeks to collect only from foreign consumers. In any event, these "costs," even if eventually collected from foreign and domestic consumers alike, are collected in such a fashion as to erect barriers to the free flow of interstate commerce. Those are protectionist effects that engage the State's burden of justification; a burden the State cannot carry.

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[22] Accord, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 619 (1980) (Montana's severance tax upheld because "the tax burden is born according to the amount of coal consumed and not according to any distinction between instate and out-of-state consumers).

CONCLUSION

Because the surcharge assessed by Oregon on foreign waste discriminates against interstate commerce on its face, in its purpose, and in its effect, thereby passing to the State a burden of justification it cannot carry, petitioner respectfully requests that this Court reverse the decision of the Oregon Supreme Court and strike ORS 459.297, ORS 459.298, OAR 340-97-110 and OAR 340-97-120 as violative of the Commerce Clause of the United States Constitution.

Respectfully submitted,

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